IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DEALERS SUPPLY COMPANY, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:03CV00654
	)	
CHEIL INDUSTRIES, INC. and SAMSUNG CHEMICAL (USA), INC.,	)	
	)	
Defendant.	)	

O R D E R

This matter comes before the Court on Defendants' motion to exclude the testimony and expert report of Andrew C. Brod ("Brod") pursuant to Rule 702 of the Federal Rules of Evidence. Defendants claim that Brod, Plaintiff's designated expert for purposes of analyzing and projecting Plaintiff's lost profit damages, is "wholly unqualified to provide 'expert' testimony regarding lost profits." (Defs.' Mot. to Exclude 2.) Defendants also contend that Brod's testimony is (1) "legally irrelevant" to Plaintiff's remaining claims, (2) "contradicted by material factual evidence," and (3) "premised upon methodologically flawed and unreliable principles." (Id.)

As both parties correctly note, preliminary questions of admissibility are determined by the court. See Fed. R. Evid. 104(a). The admissibility of expert testimony is further limited to the sound discretion of the trial judge, who acts as gatekeeper for such evidence. Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The gatekeeping function may be exercised in

one of two ways: through a motion in limine or by an appropriate motion at trial. Benefield v. Clarkson, 2006 WL 3308218, at *1 (W.D.N.C. Nov. 13, 2006). Both of these scenarios allow the trial judge to conduct his or her own inquiry of the witness before determining whether the witness should be allowed to testify. Id.; see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). Generally, it is during such hearings that the court considers the relevancy and reliability factors provided by Rule 702 and Daubert. A motion to exclude brought well before trial and before the trial judge is ascertained is generally wasteful, inefficient, and not to be countenanced. Benefield, 2006 WL 3308218, at *1.

Conducting the determination of admissibility at trial, or just prior to trial, promotes both efficiency and fairness. It ensures, for example, that the judge ruling on the motion will be the trial judge, as contemplated by Daubert. Further, because there is no guarantee that an expert will be called to testify, this approach greatly reduces the number of unnecessary pretrial qualifications. Id.

In the present case, Defendants chose not to file a motion in limine. Rather, they filed a motion to exclude Brod from testifying, significantly before trial and without a hearing before the trial judge. Not only is the motion premature, but it also majorly raises issues more appropriate for summary judgment.

Starting first with Defendants' claim that the expert is not qualified to give an opinion, their argument primarily attacks the basis and validity of Brod's proposed testimony, rather than his

underlying qualifications. Defendants attempt to make much of the fact that the expert has not prepared many lost profit analyses. They also chide him for not being a CPA. What they fail to do is show that his education and training preclude him from having the capacity for being able to prepare such an opinion.

Defendants next assert that Brod's testimony will be "legally irrelevant" to Plaintiff's remaining claims. This argument would be proper in Defendants' motion for summary judgment, but not here. In ruling on a summary judgment motion, a court may consider whether the evidence, including potential expert testimony, creates any triable issue of fact. Black & Decker Corp. v. United States, 436 F.3d 431, 442 (4th Cir. 2006). If, as Defendants suggest, Brod's testimony should be excluded because it has no bearing on this case, the issue should have been raised as grounds for summary judgment on the issue of damages. Defendants' attempt to incorporate it into an ancillary motion may not be used to circumvent briefing limitations or other procedural rules of this Court.

Related to Defendants' argument that the expert testimony is irrelevant, is Defendants' assertion that the facts underlying the opinion are contradicted by other factual evidence. This argument is clearly a matter for trial. At that point, Defendants may rebut Brod's testimony with the contradictory evidence itself. As the Fourth Circuit noted in Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999):

> [T]he court need not determine that the expert testimony a litigant seeks to offer into evidence is irrefutable or certainly correct. As with all other admissible evidence, expert testimony is subject to being tested by "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof."

Id.(quoting Daubert, 509 U.S. at 596)(internal citations omitted). In short, the issue of whether evidence is contradicted goes directly to its weight and credibility, rather than its admissibility. Such determinations are exclusively for the trier of fact.

The last issue raised by Defendants comes the closest to being a motion in limine. Here, Defendants assert the expert testimony is premised on methodologically flawed and unreliable principles. However, by not filing a motion in limine, Defendants make it inadvisable to rule on the issue as raised in their motion. Notably, the methods and principles underlying such testimony cannot be confidently ascertained until actual testimony is offered. Until that time, there is no "testimony" in issue - only the possibility of testimony. At this point, Defendants simply claim that Brod's expert report and deposition fail "to demonstrate that the methodologies he chose to calculate lost profits are widely accepted in the field or produce reliable results." (Defs.' Br. 12.) This is different than saying Brod will be unable to present a reliable foundation at trial or prove the reliability of his methods at a Daubert hearing.

A motion in limine carries with it the possibility of a hearing, either before or at trial. Although in limine hearings

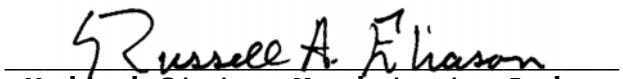
are not strictly required when making Daubert determinations, the parties must "have an adequate opportunity to be heard" before the trial court makes its decision. See Group Health Plan, Inc. v. Philip Morris USA, Inc., 344 F.3d 753, 761 n.3 (8th Cir. 2003); Nelson v. Tennessee Gas Pipeline Co., 243 F.3d 244, 249 (6th Cir. 2001). In Group Health Plan, for example, there was an adequate opportunity to be heard where the party proffering the witness was allowed to present written submissions by the witness himself and other experts in support of its argument. Id., 344 F.3d at 761 n.3. These submissions were in addition to the mere briefing by the parties. Id. The court's decision in Nelson was based on a similarly informed record. Id., 243 F.3d at 249. In contrast, because of the nature of the motion, the Court has before it a restricted record[1] in which Brod has not had sufficient opportunity to present explanations so that the Court would be in a position to determine the reliability of Brod's opinion at this stage.[2] This Court also notes that whether to hold a hearing to investigate reliability, like the determination of reliability itself, is a decision for the trial judge. Kumho, 526 U.S. at 152. Therefore, the trial judge must be given the opportunity to inquire into Brod's reasoning and methodology, in a hearing or otherwise, before

[1]The record consists of parts of Brod's deposition and Rule 26 expert report.

[2]This is not to say that Defendants have not noted some serious, apparent flaws in the construction of an opinion by Brod, which, if left unexplained, may well result in the disallowance of his being able to offer an opinion. However, the proper vehicle to bring this issue out is in a motion in limine before the trial judge.

all testimony based on it can be summarily rejected. Defendants' motion fails to bring these possibilities forward.

IT IS THEREFORE ORDERED that Defendants' motion to exclude the testimony and expert report of Andrew C. Brod (docket no. 62) is denied.



United States Magistrate Judge

March 8, 2007